



Region 10 Briefing Paper for the Office of the Regional Administrator

MEETING/EVENT TITLE: Options for Additional Public Comment on Pebble/Bristol Bay 404(c) Action

MEETING DATE: March 7, 2018

LOCATION: R10 ET Conference Room; HQ 3233 WJCE

PREPARED BY: Pebble/Bristol Bay 404(c) team, including staff from R10, OW, and OGC

DATE: March 2, 2018

TARGET ATTENDEES: Chris Hladick (R10), Lee Forsgren (OW), David Fotouhi (OGC)

EXTERNAL PARTICIPANTS: N/A

I. PURPOSE

The purpose of this briefing is to discuss options and a recommendation for implementing EPA's commitment to seek additional public comment regarding EPA's ongoing Pebble/Bristol Bay 404(c) action. EPA's January 26, 2018 decision not to withdraw the 2014 Proposed Determination (PD) includes a commitment to seek additional public comment: "The Agency intends at a future time to solicit public comment on what further steps, if any, the Agency should take in the Section 404(c) process in order to prevent unacceptable adverse effects to the watershed's world-class fisheries in light of the permit application that has now been submitted to the Corps."

II. BACKGROUND

A. Section 404(c) Process

- EPA initiated this Section 404(c) process in 2014, issued a PD, and took public comment on the PD, but was prevented from responding to the public comments or completing its CWA Section 404(c) review because of a preliminary injunction associated with litigation brought by Pebble.
- A PD is the second step in EPA's four step CWA Section 404(c) review process of: 1) Initiation, 2) PD, 3) Recommended Determination (RD), and 4) Final Determination (FD) (40 CFR part 231). The relevant Region issues the PD and RD, and HQ-OW issues the FD that either rescinds, modifies, or affirms the RD (40 CFR 231.6).
 - A PD is issued if the Regional Administrator determines that unacceptable adverse effects "could result." An RD requires a determination that such effects "would be likely" to result and an affirmative FD that imposes restrictions or prohibitions requires a determination that such effects "will result" (40 CFR 231.3, 231.5, and 231.6).
- Under the terms of EPA's May 2017 settlement agreement with Pebble that resolved outstanding litigation, EPA can issue a new or modified PD, or withdraw the PD, at any time.
 - If EPA were to issue a new or modified PD, EPA would need to solicit public comment consistent with EPA's regulations.
- The timing associated with the next step in the 404(c) process, the RD, is limited by the settlement agreement: Region 10 may not forward a signed RD, if such a decision is made, to HQ before either May 11, 2021, or until the U.S. Army Corps of Engineers (Corps) completes a final Environmental Impact Statement (EIS) on Pebble's CWA Section 404 permit application, whichever comes first.

- If at some point, after the time limits in the settlement agreement expire, Region 10 decides to forward an RD to HQ, EPA's 404(c) regulations do not require a public comment period at that time. In making a decision whether to issue an FD, EPA HQ must consult with the Corps, the relevant landowner, and the State.

B. Basis for 404(c) Decision-making

1. 2014 PD

- The 2014 PD is based, in part, on the Bristol Bay Watershed Assessment (BBWA), which evaluated the impacts of three potential mine scenarios at the Pebble deposit (0.25, 2.0 and 6.5 billion-ton mines) on fishery resources.
- The BBWA evaluated the impacts associated with the construction and routine operation of these three mine scenarios (including its transportation corridor), as well as the impacts of a series of possible accidents and failures that occur at mines of this type.
- The BBWA considered all compensatory mitigation information provided as of 2013 by Pebble and other commenters.
- The restrictions in the 2014 PD are based on an analysis of the direct and secondary impacts on fishery areas of the discharge of dredged or fill material into waters of the U.S. associated with the construction and routine operation of the 0.25 billion-ton mine scenario.
- The 2014 PD is focused just on the mine site, and does not address impacts from other project elements, such as the transportation corridor or a port on Cook Inlet or from any possible accidents or failures.

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III. OPTIONS DISCUSSION

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IV. RECOMMENDATION

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[PAGE * MERGEFORMAT]

Message

From: Hladick, Christopher [hladick.christopher@epa.gov]
Sent: 10/22/2018 8:15:09 PM
To: Lyons, Troy [lyons.troy@epa.gov]
CC: Forsgren, Lee [Forsgren.Lee@epa.gov]
Subject: White House meeting: Alaska and warm weather

Troy:

Non-Responsive – Material Unrelated to Bristol Bay/Pebble Mine

Pebble: Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

https://news.vice.com/en_us/article/kzjxmm/alaska-initiative-to-protect-wild-salmon-could-kill-off-a-massive-open-pit-mine

Hope this helps

Chris Hladick
Regional Administrator
U.S. Environmental Protection Agency, Region 10
Office: (206) 553-1234
Cell: (206) 247-2946
Fax: (206) 553-1809

Message

From: Forsgren, Lee [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A055D7329D5B470FBAA9920CE1B68A7D-FORSGREN, D]
Sent: 6/8/2018 5:10:50 PM
To: Fontaine, Tim [Fontaine.Tim@epa.gov]
CC: Best-Wong, Benita [Best-Wong.Benita@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]; Woods, Terry [Woods.Terry@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]
Subject: RE: Calvert 028-032

Deliberative Process / Ex. 5

From: Fontaine, Tim
Sent: Friday, June 8, 2018 12:32 PM
To: Forsgren, Lee <Forsgren.Lee@epa.gov>
Cc: Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Woods, Terry <Woods.Terry@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: FW: Calvert 028-032

Lee,

Just a heads up that OMB has requested that EPA get USACE concurrence on the Calver questions from the HAC hearing. These are the Alaska related questions that you helped with. OWOW will reach out at the staff level, but these might come back to you if they have to be resolved at a senior level.

Interesting that OMB does not want to adjudicate issues as part of the the cross-agency review.

Tim Fontaine
EPA Office of Water
(202) 564-0318

From: Woods, Terry
Sent: Friday, June 08, 2018 11:29 AM
To: Brown, Robert <Brown.Robert@epa.gov>; Moore, Kristie <Moore.Kristie@epa.gov>
Cc: Fontaine, Tim <Fontaine.Tim@epa.gov>; Drummond, Laura <Drummond.Laura@epa.gov>; Giddings, Daniel <giddings.daniel@epa.gov>
Subject: FW: Calvert 028-032

Hi OWOW.....

Can you please coordinate EPA's response to the Calvert 028-032 questions with the Corps? Please let me know when you get their concurrence. Thank you!

For your convenience I have attached the version that Lee and OGC approved.

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Terry Woods
Office of Water
Resource Management Staff
202-564-0326

From: Cuscino, Glen
Sent: Friday, June 08, 2018 10:13 AM
To: Woods, Terry <Woods.Terry@epa.gov>
Cc: Giddings, Daniel <giddings.daniel@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Villanueva, Edna <Villanueva.Edna@epa.gov>; Drummond, Laura <Drummond.Laura@epa.gov>
Subject: FW: Calvert 028-032

Terry - -OMB is requesting you seek their concurrence

From: Grossman, Andrea L. EOP/OMB EOP / Ex. 6
Sent: Friday, June 8, 2018 10:10 AM
To: Cuscino, Glen <Cuscino.Glen@epa.gov>
Cc: Hickey, Mike J. EOP/OMB EOP / Ex. 6
Subject: RE: Calvert 028-032

OK thanks for checking. Please coordinate with the Corps directly and have then cc me when we get Corps sign-off on this QFR response.

Andrea Grossman
Program Examiner, OMB Environment Branch
202-395-4756

From: Cuscino, Glen <Cuscino.Glen@epa.gov>
Sent: Friday, June 8, 2018 10:03 AM
To: Grossman, Andrea L. EOP/OMB EOP / Ex. 6
Subject: FW: Calvert 028-032

Andrea—OW didn't talk to the Corps....

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Subject: RE: Calvert 028-032

Hi Glen.....

No, We didn't get Corps input on our responses. Please let me know if you need anything else. Thank you!

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Terry Woods
Office of Water
Resource Management Staff
202-564-0326

From: Cuscino, Glen
Sent: Thursday, June 07, 2018 2:58 PM

To: Drummond, Laura <Drummond.Laura@epa.gov>; Giddings, Daniel <giddings.daniel@epa.gov>
Cc: Spraul, Greg <Spraul.Greg@epa.gov>; Fontaine, Tim <Fontaine.Tim@epa.gov>; Woods, Terry <Woods.Terry@epa.gov>; Villanueva, Edna <Villanueva.Edna@epa.gov>
Subject: FW: Calvert 028-032

Hello : Can you please find out if the CAL0028-032 answers were vetted with ACE? Andrea's request below....

From: Grossman, Andrea L. EOP/OMB [REDACTED] **EOP / Ex. 6**
Sent: Thursday, June 7, 2018 2:55 PM
To: Cuscino, Glen <Cuscino.Glen@epa.gov>
Cc: Hickey, Mike J. EOP/OMB [REDACTED] **EOP / Ex. 6** Villanueva, Edna <Villanueva.Edna@epa.gov>
Subject: Calvert 028-032

Glen,

It looks like Edna is out, but maybe you can answer my question about these QFRs on Pebble Mine- do you know if these were shared with Army Corps? I sent it within OMB to the examiner who covers Army Corps since the responses discuss their regulations and processes, and she asked me to confirm whether Army Corps has seen/signed off on the draft responses.

Thanks,

Andrea Grossman
Program Examiner, OMB Environment Branch

[REDACTED] **EOP / Ex. 6**

Message

From: Moore, Kristie [Moore.Kristie@epa.gov]
Sent: 6/7/2018 7:28:17 PM
To: Frazer, Brian [Frazer.Brian@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]
CC: Brown, Robert [Brown.Robert@epa.gov]
Subject: FW: Calvert 028-032
Attachments: CAL-028-032.docx; FY19 HEC McK Permit Veto-CHANGES.docx

Russ,

OMB is asking if we shared these responses with the Corps. From the back and forth I'm assuming the answer is no, but wanted to confirm. Can you please let Bob and me know either way?

Deliberative Process / Ex. 5

Kristie

Kristie M. Moore
Office of Wetlands Oceans and Watersheds
U.S. Environmental Protection Agency
EPA West
1200 Pennsylvania Ave., NW
MC-4501 T
Washington, DC, 20460
office: (202) 566-1616

From: Woods, Terry
Sent: Thursday, June 07, 2018 3:07 PM
To: Moore, Kristie <Moore.Kristie@epa.gov>; Brown, Robert <Brown.Robert@epa.gov>
Cc: Fontaine, Tim <Fontaine.Tim@epa.gov>; Drummond, Laura <Drummond.Laura@epa.gov>; Spraul, Greg <Spraul.Greg@epa.gov>; Giddings, Daniel <giddings.daniel@epa.gov>
Subject: FW: Calvert 028-032

Hi Kristie....

Do you know if these QFRs on Pebble Mine were shared with Army Corps? See more information below. Thanks!

FYI.... This is the latest version of the QFRs approved by Lee and OGC.

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Office of Water
Resource Management Staff
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<Woods.Terry@epa.gov>; Villanueva, Edna <Villanueva.Edna@epa.gov>

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EOP / Ex. 6

Sent: Thursday, June 7, 2018 2:55 PM

To: Cuscino, Glen <Cuscino.Glen@epa.gov>

Cc: Hickey, Mike J. EOP/OMB

EOP / Ex. 6

Villanueva, Edna <Villanueva.Edna@epa.gov>

Subject: Calvert 028-032

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Thanks,

Andrea Grossman

Program Examiner, OMB Environment Branch

EOP / Ex. 6

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From: Moore, Kristie [Moore.Kristie@epa.gov]
Sent: 6/11/2018 11:06:42 AM
To: Frazer, Brian [Frazer.Brian@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]
CC: Brown, Robert [Brown.Robert@epa.gov]
Subject: RE: Calvert 028-032
Attachments: FW: Calvert 028-032

Brian,

Deliberative Process / Ex. 5

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U.S. Environmental Protection Agency
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1200 Pennsylvania Ave., NW
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Washington, DC, 20460
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From: Frazer, Brian
Sent: Monday, June 11, 2018 6:58 AM
To: Moore, Kristie <Moore.Kristie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>
Cc: Brown, Robert <Brown.Robert@epa.gov>
Subject: RE: Calvert 028-032

Kristie,

Deliberative Process / Ex. 5

I'll ask Russ to share our comments with the Corps this morning so that they are aware.

Thanks

bf

From: Moore, Kristie

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To: Kaiser, Russell [Kaiser.Russell@epa.gov]
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As we may have anticipated, OMB's now asking that we get COE's OK on the Calvert responses. Would you do that, please?

Brown
1307

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To: Brown, Robert <Brown.Robert@epa.gov>; Moore, Kristie <Moore.Kristie@epa.gov>
Cc: Fontaine, Tim <Fontaine.Tim@epa.gov>; Drummond, Laura <Drummond.Laura@epa.gov>; Giddings, Daniel <giddings.daniel@epa.gov>
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Sent: Thursday, June 7, 2018 2:55 PM

EOP / Ex. 6

To: Cuscino, Glen <Cuscino.Glen@epa.gov>

Cc: Hickey, Mike J. EOP/OMB

EOP / Ex. 6

Villanueva, Edna <Villanueva.Edna@epa.gov>

Subject: Calvert 028-032

Glen,

It looks like Edna is out, but maybe you can answer my question about these QFRs on Pebble Mine- do you know if these were shared with Army Corps? I sent it within OMB to the examiner who covers Army Corps since the responses discuss their regulations and processes, and she asked me to confirm whether Army Corps has seen/signed off on the draft responses.

Thanks,

Andrea Grossman

Program Examiner, OMB Environment Branch

EOP / Ex. 6

Message

From: Palomaki, Ashley [Palomaki.Ashley@epa.gov]
Sent: 5/9/2018 2:03:07 AM
To: Hough, Palmer [Hough.Palmer@epa.gov]
CC: Nalven, Heidi [Nalven.Heidi@epa.gov]; Bennett, Brittany [bennett.brittany@epa.gov]; Peterson, Erik [Peterson.Erik@epa.gov]
Subject: RE: Draft Response to PLP Letters

Thanks, Palmer. We got some additional guidance from Carrie and I'm going to add a one-pager to the front of this. Heidi and I will have it ready for you guys to review at the beginning of next week.

Ashley Palomaki

Assistant Regional Counsel
U.S. EPA Region 10 Office of Regional Counsel
1200 Sixth Avenue, Suite 155, ORC-113
Seattle, WA 98101
206-553-8582

From: Hough, Palmer
Sent: Tuesday, May 08, 2018 5:45 AM
To: Palomaki, Ashley <Palomaki.Ashley@epa.gov>
Cc: Nalven, Heidi <Nalven.Heidi@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Peterson, Erik <Peterson.Erik@epa.gov>
Subject: Re: Draft Response to PLP Letters

I'm on travel all week and will look at this as soon as I can.

Sent from my iPhone

On May 7, 2018, at 4:58 PM, Palomaki, Ashley <Palomaki.Ashley@epa.gov> wrote:

Hi – Was having issues last week with sharing, but this link should work.

https://usepa-my.sharepoint.com/:w/g/personal/palomaki_ashley_epa_gov/ESlVoKrrl9tEgZk8v00Fmy4BE90B3ReCclaiAuGZg71XmA?e=bMiqWb

Have talked to Allyn a bit on this and given that it's unclear to us what end product may/may not be

Deliberative Process / Ex. 5

Ashley Palomaki

Assistant Regional Counsel
U.S. EPA Region 10 Office of Regional Counsel
1200 Sixth Avenue, Suite 155, ORC-113
Seattle, WA 98101
206-553-8582

From: Palomaki, Ashley

Sent: Thursday, May 03, 2018 9:20 AM

To: Hough, Palmer <Hough.Palmer@epa.gov>; Nalven, Heidi <Nalven.Heidi@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Peterson, Erik <Peterson.Erik@epa.gov>

Subject: Draft Response to PLP Letters

Hi –

Per David's and Carrie's request, attached a draft summary response to PLP's 4/24 and 4/25 letters. I

Attorney Client Privilege/Deliberative Process Privilege / Ex. 5

Have at it!

Ashley

Ashley Palomaki

Assistant Regional Counsel

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